



**U.S. Immigration
and Customs
Enforcement**

February 9, 2012

MICHAEL MORISY
MUCKROCK NEWS
DEPT MR 948
PO BOX 55819
BOSTON, MA 02205-5819

RE: OPLA12-364, 2012FOIA3204

Dear Mr. Morisy:

This is in response to your letter dated January 7, 2012, appealing the adverse determination in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request. The initial request asked for any manuals, documents, or other written guidance used to access or analyze data gathered by programs developed or deployed by Carrier IQ.

U.S. Immigration and Customs Enforcement (ICE) initially denied your request in part by denying your request for a fee waiver and placing you in the "all other" fee category. You have appealed the decision to deny your request for a fee waiver and the fee category you have been placed in. ICE has further reviewed your request in question that gave rise to this partial denial of your request. Our analysis follows.

ICE FOIA properly indicated that the standard for a fee waiver has been met if "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."¹ More specifically, the Department of Justice issued revised fee waiver policy guidance on April 2, 1987.² These regulations set forth six factors to examine in determining whether the applicable legal standard for fee waiver has been met. Those six factors are as follows: (1) whether the subject of the requested records concerns "the operations or activities of the government"; (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor of a narrow segment of interested persons; (4) whether the contribution to public understanding of government operations or activities will be "significant"; (5) whether the requester has a commercial interest that would be furthered by the requested disclosure; and (6) whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure that disclosure is primarily in the commercial interest of the requestor.

¹ See, *Piper v. U.S. Dep't of Justice*, 294 F. Supp. 2d 16, 24 (D.D.C. 2003).

² See, 5 U.S.C. § 552(e); see also *FOIA Update*, Vol. XIX, No. 3, at 6; *FOIA Update*, Vol. XIV, No. 3, at 8.

You have appealed, specifically indicating that Muckrock News is a representative of the news media. Particularly, the definition of a "representative of the news media" as applied under 28 C.F.R. § 16.11(b)(6), states that in order to qualify for news media status, the requester must be "an entity that is organized and operated to publish or broadcast news." These regulations, were promulgated by the agency and "established to facilitate public interaction with the DHS Office of the Secretary" and governs the definition of "media requester" as they are to "apply (to) each component of the Department."³ As such, the FOIA Office, as well as OPLA who now adjudicates this appeal, are bound by 28 C.F.R. 16. More specifically, requesters who merely let reporters view documents collected from the government, act as a records clearinghouse, or provide records to other individuals of the news media, do not qualify for news media status⁴.


As such, the determination regarding the denial of a fee waiver request was proper in all respects under the applicable provisions of 5 U.S.C. § 552 cited above.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

This decision is the final action of the Department of Homeland Security concerning your FOIA/PA request for expedited processing and a waiver of fees. Inasmuch as you consider this to be a denial of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B) in the United States District Court in the district in which you reside, or in which the agency records are situated, or in the District of Columbia.

Should you have any questions regarding this appeal closure, please contact ICH at ice-foia@dhs.gov. In the subject line of the email please include the word "appeal", your appeal number, which is **OPLA12-364** and the FOIA case number, which is **2012FOIA3204**.

Sincerely,


Susan Mathias
Chief
Government Information Law Division
ICE Office of the Principal Legal Advisor
Department of Homeland Security

³ 6 C.F.R. 5(1-10).

⁴ See, *Judicial Watch v. United States Dep't of Justice*, No. 99-2315, 2000 WL 33724693, at **3-4 (D.D.C. Aug. 17, 2000).